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In the Supreme Court of the United States

JAIME CASTILLO, BRAD EUGENE BRANCH, RENOS LENNY AVRAAM, GRAEME LEONARD CRADDOCK, KEVIN A. WHITECLIFF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

18 U.S.C. §924(c)(1) punishes with five years imprisonment whoever, during and in relation to a federal crime of violence, "uses or carries a firearm, . . . and if the firearm is a machinegun" or other specified firearm type, with thirty years (or life imprisonment for a second conviction). The substantive issue is whether the specified firearm type is an element of the offense which must be alleged in the indictment and found by the jury beyond a reasonable doubt, or is a sentencing factor to be found by the judge by a preponderance of evidence. This raises the jurisprudential issue of whether equivocal "legislative history" overrides the doctrine of constitutional doubt set forth in *Jones v. United States*, 526 U.S. 227 (1999), that a statute must be interpreted to avoid possible unconstitutionality under the Fifth and Sixth Amendments.

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES .. 1

STATEMENT OF THE CASE 2

(i) Proceedings in the Courts Below 2

(ii) Statement of Facts 4

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. THE TEXT AND STRUCTURE OF § 924(c) AND FEDERAL-STATE LAW TRADITIONS ESTABLISH THAT FIREARM TYPES ARE OFFENSE ELEMENTS 11

A. "Firearm" and Specified Firearm Types Are Offense Elements Throughout the Entire

Gun Control Act 11

B. As Recognized by Other Circuits, Jury Determination of Whether a Weapon Was "Used or Carried" Includes *What* Was Used or Carried 20

C. The States Have Traditionally Treated Firearm Types as Offense Elements 26

II. CONSTITUTIONAL DOUBT IS RAISED UNDER *JONES V. UNITED STATES*, 526 U.S. 227 (1999) 30

III. READING FIREARM TYPES AS OFFENSE ELEMENTS IS REQUIRED BY DUE PROCESS AND SUPPORTED BY LEGISLATIVE HISTORY 39

A. "Legislative History" Does Not Override The Rules of Constitutional Doubt and Lenity 39

B. The Legislative History Indicates that § 924(c) Created Elements, Not Sentencing Factors 44

CONCLUSION 50

APPENDIX: SURVEY OF STATE LAW 1a

TABLE OF AUTHORITIES

CASES **Page**

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 9, 37, 38

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 50

Bailey v. United States, 516 U.S. 137 (1995) 3, 8, 20, 22, 25, 26

Bryan v. United States, 524 U.S. 184 (1998) 18

Busic v. United States, 446 U.S. 398 (1980) 43

Cockrum v. State, 24 Tex. 394 (1859) 27

Crandon v. United States, 494 U.S. 152 (1990) 41

Deal v. United States, 508 U.S. 129 (1993) 17

Dillard v. Commonwealth, 28 Va. App. 340, 504 S.E.2d 411 (1998) 28

Duncan v. Louisiana, 391 U.S. 145 (1968) 37

Edwards v. United States, 523 U.S. 511 (1998) 35

Evans v. United States, 504 U.S. 255 (1992) 7

F.J. Vollmer Co., Inc. v. Magaw, 102 F.2d 591

(D.C. Cir. 1996) 15

Garcia v. United States, 469 U.S. 70 (1984) 41

Garrett v. United States, 471 U.S. 773 (1985) 17

Harrison v. PPG Industrial Inc., 446 U.S. 578 (1980) .. 48

Hughey v. United States, 495 U.S. 411 (1990) 41

In re Winship, 397 U.S. 358 (1970) 33, 34

Jones v. United States, 526 U.S. 227 (1999) ..... *passim*

McMillan v. Pennsylvania, 477 U.S. 79 (1986) . 24, 28, 35

Mullaney v. Wilbur, 421 U.S. 684 (1975) 14, 33, 34

Nye & Nissen v. United States, 336 U.S. 613 (1949) 26

Patterson v. New York, 432 U.S. 197 (1977) 34

People v. Bland, 10 Cal. 4th 991, 898 P.2d 391 (1995) . 28

Pereira v. United States, 347 U.S. 1 (1954) 26

Pinkerton v. United States, 328 U.S. 640 (1946) 5-6, 9, 21, 25, 26

Ratzlaf v. United States, 510 U.S. 135 (1994) 41

Rex v. Knight, Comb. 38, 90 Eng. Rep. 330

(K. B. 1686) 27

Richardson v. United States, 119 S. Ct. 1707 (1999) ... 25

Simpson v. State, 13 Tenn. Reports (5 Yerg.) 356 (1833) 27

Simpson v. United States, 435 U.S. 6 (1978) 43, 44

Smith v. United States, 508 U.S. 223 (1993) 14, 23

Staples v. United States, 511 U.S. 600 (1994) 11

State v. Black, 161 Ore. App. 662, 987 P.2d 530 (1998) . 29

State v. Huntley, 25 N.C. (3 Iredell) 284 (1843) 27

State v. Kang, 84 Haw. 352, 933 P.2d 1386 (1997) 29

State v. Vanstory, 91 Haw. 33, 979 P.2d 1059 (1999) ... 29

State v. Wedge, 293 Or. 598, 652 P.2d 773 (1982) 29

Tafflin v. Levitt, 493 U.S. 455 (1990) 41

United States v. Alborola-Rodriguez, 153 F.3d 1269 (11th Cir. 1998), *cert. denied*, 525 U.S. 1030 (1999) ... 24

United States v. Alerta, 96 F.3d 1230 (9th Cir. 1996) ... 23

United States v. Allen, 190 F.3d 1208 (11th Cir. 1999) 40

United States v. Bass, 404 U.S. 336 (1971) 42, 43

United States v. Brady, 710 F. Supp. 290 (D. Colo. 1989) 15

United States v. Chestaro, 197 F.3d 600 (2d Cir. 1999) . 40

United States v. Correa-Ventura, 6 F.3d 1070 (5th Cir. 1993) 21

United States v. Davis, 801 F.2d 754 (5th Cir. 1986) 17-18

United States v. Doucet, 994 F.2d 169 (5th Cir. 1993) .. 15

United States v. Eads, 191 F.3d 1206 (10th Cir. 1999), *petition for cert. pending*, No. 99-6907 (filed Nov. 1, 1999) 24

United States v. Farris, 77 F.3d 391 (11th Cir.), *cert. denied*, 519 U.S. 896 (1996) 25

United States v. Feinberg, 98 F.3d 333 (7th Cir. 1996) .. 23

United States v. Garcia, 77 F.3d 274 (9th Cir. 1996) ... 25

United States v. Gaudin, 515 U.S. 506 (1995) 37

United States v. Gilliam, 167 F.3d 628 (D.C. Cir.), *cert. denied*, 145 L. Ed. 2d 100 (1999) 24-25

United States v. Harris, 959 F.2d 246 (D.C. Cir.), *cert. denied*, 506 U.S. 932 (1992) 22

United States v. Hitt, 981 F.2d 422 (9th Cir. 1992) 15

United States v. Homa, 608 F.2d 407 (10th Cir. 1979) .. 15

United States v. Martinez, 7 F.3d 146 (9th Cir. 1993) 21, 22, 50

United States v. Meadows, 91 F.3d 851 (7th Cir. 1996) . 15

United States v. Melvin, 27 F.3d 710 (1st Cir. 1994) 22, 24, 50

United States v. Moore, 958 F.2d 310 (10th Cir. 1992) .. 23

United States v. Nuñez, 180 F.3d 227 (5th Cir. 1999) ... 40

United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984) 36

United States v. Perez, 129 F.3d 1340 (9th Cir. 1997) .. 24

United States v. R.L.C., 503 U.S. 291 (1992) 41

United States v. Reindeau, 947 F.2d 32 (2d Cir. 1991) .. 15

United States v. Rodriguez, 841 F. Supp. 79 (E.D.N.Y. 1994), *affd*, 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995) 22

United States v. Santos, 84 F.3d 43 (2d Cir. 1996) 25

United States v. Seven Miscellaneous Firearms,

503 F. Supp. 565 (D.D.C. 1980) 15

United States v. Shea, 150 F.3d 44 (1st Cir.), *cert. denied*, 525 U.S. 1030 (1998) 24

United States v. Shepard, No. 94-5307, 1995 U.S. App. LEXIS 5802 (4th Cir. 1995) 24

United States v. Shuler, 181 F.3d 1188 (10th Cir. 1999) . 23

United States v. Sims, 975 F.2d 1225 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993) 20, 21, 50

United States v. Spinner, 152 F.3d 950 (D.C. Cir. 1998) 15

United States v. Staples, 971 F.2d 608 (10th Cir. 1992), *revd on other grounds*, 511 U.S. 600 (1994) 16

United States v. Tankersley, 492 F.2d 962 (7th Cir. 1974) 13

United States v. Thompson, 82 F.3d 849 (9th Cir. 1996) . 25

United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) 15-16, 45

United States v. Whiting, 28 F.3d 1296 (1st Cir. 1994) .. 15

United States v. Wills, 88 F.3d 704 (9th Cir.), *cert. denied*, 519 U.S. 1000 24

Williams v. State, 724 So. 2d 652 (Fla. 1999) 29

CONSTITUTION

U.S. Const. amendment V ..... *passim*

U.S. Const. amendment VI ..... *passim*

STATUTES

8 U.S.C. § 1326 37

18 U.S.C. § 111(b) 40

18 U.S.C. § 848(a)(1) 17

18 U.S.C. § 921(a) 7, 12

18 U.S.C. § 921(a)(3) 12

18 U.S.C. § 921(a)(3)(A) 13

18 U.S.C. § 921(a)(3)(C) 13, 38

18 U.S.C. § 921(a)(3)(D) 13, 38

18 U.S.C. § 921(a)(4) 12

18 U.S.C. § 921(a)(4)(A) 13

18 U.S.C. § 921(a)(4)(B) 13

18 U.S.C. § 921(a)(4)(C) 13

18 U.S.C. § 921(a)(5) 12

18 U.S.C. § 921(a)(6) 12

18 U.S.C. § 921(a)(7) 12

18 U.S.C. § 921(a)(8) 12

18 U.S.C. § 921(a)(23) 12

18 U.S.C. § 921(a)(24) 12, 13

18 U.S.C. § 921(a)(30) 12

18 U.S.C. § 922 ..... 14, 18

18 U.S.C. § 922(a)(4) 14

18 U.S.C. § 922(a)(5) 19

18 U.S.C. § 922(b)(1) 19

18 U.S.C. § 922(b)(4) 14

18 U.S.C. § 922(d) 19

18 U.S.C. § 922(f)(1) 19

18 U.S.C. § 922(i) 19

18 U.S.C. § 922(j) 19

18 U.S.C. § 922(o) 14

18 U.S.C. § 922(v)(1) 14

18 U.S.C. § 922(v)(3) 12

18 U.S.C. § 922(2) 19

18 U.S.C. § 922(3) 16

18 U.S.C. § 924 ..... 14, 18

18 U.S.C. § 924(a)(1)(A) 19

18 U.S.C. § 924(a)(1)(B) 14

18 U.S.C. § 924(a)(1)(D) 14

18 U.S.C. § 924(a)(2) 14

18 U.S.C. § 924(a)(3)(A) 19

18 U.S.C. § 924(a)(6)(B) 18

18 U.S.C. § 924(b) 19

18 U.S.C. § 924(c) ..... *passim*

18 U.S.C. § 924(g) 19

18 U.S.C. § 924(h) 19

18 U.S.C. § 924(j) 8, 19

18 U.S.C. § 924(k) 19

18 U.S.C. § 924(l) 19

18 U.S.C. § 924(m) 19

18 U.S.C. § 924(n) 19

18 U.S.C. § 924(o) 8, 16, 32

18 U.S.C. § 1111(a) 2

18 U.S.C. § 1114 2

18 U.S.C. § 1117 2

18 U.S.C. § 1791 40

18 U.S.C. § 2119 ..... 30, 31, 32, 40

18 U.S.C. § 3591 20

18 U.S.C. § 3593 20

18 U.S.C. App. § 1202(a) 19

21 U.S.C. § 841 35

26 U.S.C. § 5845 14

26 U.S.C. § 5845(b) 12

26 U.S.C. § 5861 14

26 U.S.C. § 5861(d) 3

26 U.S.C. § 5871 14

28 U.S.C. § 1254(l) 1

P.L. 90-618, § 102, 82 Stat. 1213 (1968) 44

P.L. 98-473, § 1005, 98 Stat. 1837 (1984) 44

P.L. 99-308, 100 Stat. 449 (1986) 44-45

P.L. 100-690, § 6460, 102 Stat. 4181 (1988) 48

P.L. 101-647, § 1101, 104 Stat. 4789 (1990) 48

P.L. 103-322, 108 Stat. 1796 (1994) 50

P.L. 105-386, 112 Stat. 3469 (1998) 31

Ark. Stat. §5-73-211 (1999) 27-28

Ca. Penal Code § 12022(a) 28

Conn. Gen. Stat. § 53-202 (1999) 28

Fla. Stat. § 775.087(3)(a)1 (1999) 29

Haw. Rev. Stat. § 706-660.1(3) (1993) 29

Md. Ann. Code art. 27, § 373 (1999) 27-28

Mont. Code Anno., § 45-8-301 (1999) 27

Ore. Rev. Stat. § 161.610(2) (1997) 28

Va. Code § 18.2-289 (1999) 28

Va. Code § 18.2-300(A) 28

REGULATIONS

27 C.F.R. § 178.11 7

LEGISLATIVE MATERIALS

Cong. Rec. 46, 47, 48, 49

H. Rpt. 99-495, 99th Cong., 2d Sess. (1986) 46

H. Rpt. No. 103-489 (1994), *in* 1994 U.S.C.C.A.N. 1820 50

H. Rpt. No. 681, 101st Cong., 2d Cong. (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472 59

S. Rpt. 98-255, *in* 1984 U.S.C.C.A.N. 3182 44

OTHER AUTHORITIES

Blackstone, *Commentaries* 37

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OPINIONS BELOW

The opinion on petitioners' initial direct appeal, *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996), is printed in the appendix to the petition for a writ of certiorari ("Pet. App.") at 1a. The order denying the petitions for rehearing, 91 F.3d 752, is at Pet. App. 117a. The notice of denial of the petitions for a writ of certiorari, *Castillo v. United States*, 520 U.S. 1185 (1997), is at Pet. App. 142a. The opinion on appeal after remand for resentencing, *United States v. Castillo*, 179 F.3d 321 (5th Cir. 1999), is at Pet. App. 144a. The unreported order denying the petitions for rehearing is at Pet. App. 153a. The district court's unreported original sentencing opinion is at Pet. App. 119a. The district court's unreported resentencing order is at Pet. App. 165a.

JURISDICTION

On August 2, 1996, the Court of Appeals affirmed the convictions on Counts 2 and 3 but vacated the sentence on Count 3, which it remanded for resentencing. The defendants were resentenced and timely appealed. The Court of Appeals affirmed the sentences on June 22, 1999, and denied the petitions for rehearing and rehearing en banc on July 28, 1999. The petition for a writ of certiorari was timely filed on October 15, 1999, and was granted by this Court on January 14, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES

Provisions of the following are in Pet. App., 170a: U.S.

Const. amend. V and VI; 18 U.S.C. § 924(c)(1), (3).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The superseding indictment filed on August 6, 1993, alleged that defendants conspired to murder federal agents in violation of 18 U.S.C. § 1117 (Count 1) and aided and abetted the murder of federal agents in violation of §§ 1111(a), 1114, and 2 (Count 2). J.A. 14-15, 21-22. Count 3 alleged (J.A. 22-23):

> On or about February 28, 1993, in the Western District of Texas, Defendants [names deleted] did knowingly use and carry a firearm during and in relation to the commission of a crime of violence which may be prosecuted in a court of the United States, to-wit: Conspiracy to Murder Officers and Employees of the United States, in violation of Title 18, United States Code, Sections 1117 and 1114, all in violation of Title 18, United States Code, Section 924(c)(1).

The jury acquitted all defendants on Count 1. It acquitted all defendants of aiding and abetting murder (Count 2), but found petitioners (except Graeme Leonard Craddock) guilty of the lesser included offense of aiding and abetting voluntary manslaughter. J.A. 32-35.

Jury instructions repeated Count 3 of the indictment verbatim. J.A. 28. The jury was also instructed that guilt should be found if "the Defendant under consideration committed the crime alleged in Count One of the Indictment" and that "the Defendant under consideration knowingly used or carried a firearm during and in relation to the Defendant's

commission of the crime alleged in Count One of the Indictment." J.A. 29. As the Verdict Form reflects, each petitioner was found guilty "of the offense of using or carrying firearms during and in relation to the commission of a crime of violence as alleged in Count Three of the Indictment . . . ." J.A. 35-36.

The district court found at sentencing by a preponderance of evidence that co-conspirators had possessed machineguns and destructive devices, and that this could be attributed to the defendants. Pet. App. 125-26a. It sentenced petitioners to consecutive terms of ten years imprisonment on Count 2 and to thirty years imprisonment on Count 3 (except that, in a downward departure, Craddock was sentenced to ten years on Count 3).[1] They were also sentenced to pay a $2,000 fine ($10,000 for Avraam) and restitution of $1,131,687.

The court of appeals affirmed both convictions but vacated the § 924(c) sentences and remanded for resentencing. Pet. App. 85a. The district court had "found only that each defendant had actual or constructive possession of an enhanced weapon," which did not satisfy the "active employment" test of *Bailey v. United States*, 516 U.S. 137 (1995). Pet. App. 86a. The court added that "there is evidence from which it could be found that machineguns and other enhancing weapons were used by one or more members of the conspiracy in the firefight of February 28. The jury was not required to do so . . . ." *Id.* "Should the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence." *Id.*

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[1] Craddock was also convicted of possession of an unregistered firearm, 26 U.S.C. § 5861(d), for which he received ten years imprisonment.

Dissenting, Judge Schwarzer would have reversed both convictions due in part to insufficient evidence of individual guilt. Pet. App. 98a, 114a. "There is no evidence that any of them entered into an agreement to kill federal officers, much less that any did so with premeditation and malice aforethought. . . . [T]heir conviction of the predicate offense [for § 924(c)] rests on nothing more than guilt by association." Pet. App. 116a.

The court of appeals denied the petitions for rehearing and suggestions for rehearing en banc. Pet. App. 117a. This Court denied the petitions for a writ of certiorari. Pet. App. 142a.

The district court resentenced petitioners to thirty years imprisonment on Count 3 (except that Craddock was resentenced to ten years). Pet. App. 169a. The court of appeals affirmed (Pet. App. 144a), and the petitions for rehearing and rehearing en banc were denied. Pet. App. 153a.

Statement of Facts

Mount Carmel, near Waco, Texas, was for 65 years the home of the Branch Davidians, a religious sect originating in Seventh Day Adventism. Vernon Howell, known as David Koresh, had headed the group there since 1988. The Bureau of Alcohol, Tobacco and Firearms ("BATF") came to suspect that Koresh had violated Chapter 53 of the Internal Revenue Code, which requires registration and taxation of certain firearms. BATF agents refused Koresh's invitation to discuss his firearm purchases (Trial Transcript ["TR"] 4861, 4904) and obtained a search warrant.

Some 115 men, women, and children resided at Mount Carmel. On February 28, 1993, 75 BATF agents armed with

pistols, shotguns, and submachineguns, supported by helicopters and snipers, stormed the premises. TR 1445-49, 3826-29. BATF made no attempt to serve the warrant peaceably or to arrest Koresh off the premises. TR 1330, 6714, 6718.

Who fired the first shot was disputed. According to petitioner Jaime Castillo, when the agents arrived, Howell opened the front door and stated, "Wait a minute, there's women and children in here." "All of a sudden, shots were fired at the front door," wounding Howell. TR at 3053, 3094. BATF agent Ballesteros told investigators that he thought the first shots were fired by other agents shooting the dogs, but at trial he testified (as did other agents) that persons inside the building fired first. TR 1315, 1372. A firefight ensued.

A prosecution witness who resided at Mount Carmel testified that she did not hear anyone yell "police" before the first shots were fired, and that no insignia could be seen on the armed men outside, who dressed in black or dark blue. TR 4584, 4600. Bullets came from the outside through the walls into the house. TR 4603. Several residents and four BATF agents were tragically killed during the raid.

The FBI's final assault on April 19, 1993, resulted in an inferno consuming the entire building complex, leaving 75 babies, children, men, and women dead. The nine persons who escaped death were arrested.

At trial, the jury found only that each petitioner carried or used a "firearm." However, the court of appeals explained (Pet. App. 148a):

> On remand, the district court found that one or more persons involved in the conspiracy to murder federal agents had actively employed machine guns and other enhancing weapons in the firefight on February 28, 1993, and then applied the *Pinkerton* [*v. United States*,

328 U.S. 640 (1946)] doctrine to attribute the active employment of machine guns and other enhancing weapons to the defendants on February 28, 1993.

Alternatively, the district court found that Brad Eugene Branch[2] and Renos Lenny Avraam[3] used a machinegun on February 28. It found that Castillo and Craddock carried a hand grenade on April 19, although they were indicted for and convicted of violation of § 924(c) on February 28;[4] the court made no finding that a grenade was carried "in relation to" the predicate offense. *See* Pet. App. 168a. The court found that "there is no direct evidence that [Kevin A.] Whitecliff personally used or carried an enhancing weapon." *Id.*

The parties differ in their respective renditions of the facts (*cf.* Brief for the U.S. in Opposition 2-6),[5] but these

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[2] Branch wore "civilian clothes," an agent saw a man "dressed in civilian clothes, firing what appeared to be a fully automatic weapon," and thus Branch was the man. Pet. App. 167a. Yet at least 69 adults were in the building, and there was no eyewitness identification of Branch.

[3] A cell-mate "testified that Avraam told him that he had a fully automatic weapon during the gun battle." Pet. App. 167a. The actual testimony was that Avraam said that before that date "they were issued guns" and that he had an automatic weapon. TR 6088-6089.

[4] There was evidence that Castillo carried (but no evidence that he fired) a rifle and a pistol on February 28. TR 3053. The court stated that Castillo had a grenade "on his person" on April 19 (Pet. App. 168a), but the grenade was found in a pile of gear which could have belonged to any one of five persons whom an agent saw escaping the fire. TR 5469.

[5] Respondent points to machinegun fire on February 28, but BATF agents were firing MP5 submachineguns with two-shot bursts. *Branch*, Pet. App. 30a. After the April 19 fire, the FBI found an AK47 machinegun in a parked van, but it was inaccessible to the residents. TR 1094-95, 1110, 1132-43. A lower receiver of an M16 machinegun was found on the scene, but the FBI supplied the barrel and upper receiver to assemble a machinegun and to show it firing on a videotape. TR 1177-78, 1209-11. A "firearm frame or receiver" houses internal parts and receives the barrel. 27 C.F.R. § 178.11. Other items found were damaged beyond repair and it could not be determined whether they had ever been fired. TR 1215-16.

differences are irrelevant to the issue here.[6] The only facts essential to the issue before the Court are that petitioners were indicted for, and the jury found them guilty of, carrying or use of "firearms," not machineguns or destructive devices.

SUMMARY OF ARGUMENT

18 U.S.C. § 924(c) imposes a 5-year sentence for use or carrying of a "firearm" during and in relation to a federal crime of violence, and 30 years if the firearm is a "machinegun," a "destructive device," or "equipped with a firearm silencer or muffler." Petitioners were indicted for and found guilty of carrying or using only "firearms," not the specified firearm types. The court of appeals erred in holding that the district court may find by a preponderance of evidence that co-conspirators used machineguns or destructive devices and may sentence defendants to 30 years imprisonment.

The statutory text treats a "firearm" and a "machinegun" as elements of the offense *in pari materia*. They are in the same sentence and are separated only by commas. "Firearm" and the specified firearm types are defined in § 921(a). Certain

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[6] The rule that a guilty verdict requires that the evidence must be viewed in the light most favorable to the government, *Evans v. United States*, 504 U.S. 255, 257 (1992), applies here only to evidence supporting the verdict that "firearms" were used or carried.

definitions require a showing of scienter, and others require the jury to find that an item is a specified firearm type in order to find that it is a "firearm."

Since enactment of the National Firearms Act in 1934, federal firearms law has consistently made weapon types offense elements. The Gun Control Act of 1968 and its various amendments have continued this tradition. At trial, whether an item is a specific firearm type is frequently contested.

If firearm type is a mere sentencing factor, the sentencing court can even impose a life sentence if it finds a specified firearm in event of a second conviction under, or a conspiracy to violate, § 924(c). §§ 924(c) (second sentence), 924(o).

§ 924(c) has the same structure as other provisions in § 924 which are incontestably offense elements. The most dramatic is § 924(j), which provides that a person who, in the course of violating § 924(c), kills a person with a firearm, "shall–(1) if the killing is a murder . . ., be punished by death . . ." According to respondent's structural argument, "murder" is to be found by the sentencing court.

Inherent in the jury function to find whether a weapon was used or carried is the determination of *what* was used or carried. *Bailey v. United States*, 516 U.S. 137 (1995), held that it is a jury function to determine whether a firearm is "used." An item a judge finds at sentencing is a machinegun might not have been the "firearm" the jury found to have been "used," or may not have been deemed by the jury to be a machinegun.

Before *Branch*, the circuits to have addressed the issue uniformly held that, to impose 30 years imprisonment, the jury must find use of a machinegun or other enhanced firearm. The practice in most circuits was and is to allege the firearm type in the indictment and to submit the issue to the jury. The

underlying premise is that firearm type is an offense element.

Under *Pinkerton v. United States*, 328 U.S. 640 (1946), the use of an enhanced firearm by a co-conspirator may be attributed to a defendant as a basis for conviction of a substantive offense only if the jury so finds under appropriate instructions. The Fifth Circuit pushes the envelope by allowing the sentencing court to make this finding.

§ 924(c) is the outgrowth of a long tradition at common law and in State law of punishing the use of a weapon in a violent crime. The weapon type invariably is treated as an offense element.

Jones v. United States, 526 U.S. 227 (1999) involved a carjacking statute which is structurally identical to § 924(c). *Jones* held that, under the rule of constitutional doubt, a statute must be interpreted to avoid constitutional problems in regard to the right to notice under the Fifth Amendment's indictment and due process clauses and the right to jury trial under the Sixth Amendment. Where a provision may be read as either an element or a sentencing factor, it should be interpreted as an element and thus to require that the indictment allege and the jury find the facts necessary for the enhanced sentence.

Almendarez-Torres v. United States, 523 U.S. 224 (1998) held that recidivism is not an offense element in a prohibition on reentry after deportation. None of the grounds for that decision are present here. Recidivism "is as typical a sentencing factor as one might imagine," but whether a firearm is a machinegun certainly is not. A prior conviction is rarely contested and must itself have been established in a previous trial in which the due process and jury trial guarantees were satisfied, while the nature of an alleged firearm frequently is vigorously contested and requires expert testimony. Finally, the jury's knowledge of a prior record may unduly prejudice a

defendant, but in a § 924(c) case the jury will ordinarily examine the alleged firearm as an exhibit.

In *Castillo*, the court of appeals brushes *Jones* aside and holds that "legislative history" distinguishes § 924(c) from the statute in *Jones*. Yet "legislative history" does not override the doctrine of constitutional doubt. Floor speeches by members of Congress have little significance compared to the fundamental law as expressed in the Constitution. In *Branch*, the court of appeals conceded that § 924(c) could be read to create offense elements or sentencing factors, which should have led it to apply the rules of constitutional doubt and of lenity. Instead, it appealed to legislative history.

In actuality, the legislative history confirms that the firearm types are offense elements. The terms "firearm," "machinegun," and other firearm types are invariably explained together and with reference to the penalties. *Branch*'s sketchy "legislative history" ignores references to § 924(c) as creating offenses and illogically assumes that the term "sentence enhancement" implies that the facts authorizing the enhancement are not elements.

In sum, the firearm types specified in § 924(c) are offense elements which must be alleged in the indictment and found by the jury. The court of appeals erred in holding the firearm types to be mere sentencing factors.

ARGUMENT

I. THE TEXT AND STRUCTURE OF § 924(c) AND FEDERAL-STATE LAW TRADITIONS ESTABLISH THAT FIREARM TYPES ARE OFFENSE ELEMENTS

A. "Firearm" and Specified Firearm Types Are Offense Elements Throughout the Entire Gun Control Act

Section 924(c)(1) of Title 18, U.S. Code, punishes with five years imprisonment anyone who, during and in relation to a federal crime of violence, "uses or carries a firearm, . . . and if the firearm is a machinegun" or other specified type, imposes thirty years. Petitioners were indicted for and found guilty of use of a "firearm." The Fifth Circuit held that the specified firearm types are not offense elements and thus need not be alleged in the indictment or found by the jury. Pet. App. 78-86a; Pet. App. 151-55a. Petitioners stand sentenced to thirty years based on the district court's findings that someone in a conspiracy of which all defendants were acquitted used machineguns and destructive devices and that defendants are vicariously responsible. Pet. App. 122a, 127a, 166-67a.

"The language of the statute [is] the starting place in our inquiry . . . ." *Staples v. United States*, 511 U.S. 600, 605 (1994). The first sentence of 18 U.S.C. § 924(c)(1) provided at the time of the offense:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and

> if the firearm is a short-barreled rifle, [*sic*] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

Indisputably, commission by a person of a predicate offense (violent or drug crime), "uses or carries," "during and in relation to," and "firearm" are elements of the lowest level offense. It is textually inconsistent to say that "firearm" is an offense element but that the specified firearm types are not. They are all in the same sentence and are separated by mere commas. Stating the penalties for each weapon type was a concise and logical manner in which to draft the provision.

All of the weapon types specified in § 924(c) are defined in § 921(a). "Firearm" in pertinent part means "(A) any weapon . . . which will . . . expel a projectile by the action of an explosive; . . . (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(3). "Machinegun" is defined in part as "any weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger." § 921(a)(23), incorporating 26 U.S.C. § 5845(b). *See* § 921(a)(4) ("destructive device"), § 921(a)(5) & (6) ("shotgun" and "short-barreled shotgun"), § 921(a)(7) & (8) ("rifle" and "short-barreled rifle"), § 921(a)(24) ("firearm silencer and firearm muffler"), § 921(a)(30) ("semiautomatic assault weapon").[7]

In a § 924(c) prosecution involving an alleged

[7] Scores of different design combinations are encompassed under the subdefinitions of "semiautomatic assault weapon," which in turn excludes hundreds of specific models. § 922(v)(3) & Appendix A. A 1994 amendment added that term to § 924(c) as a ten-year offense.

destructive device as defined in § 921(a)(4)(A) (such as an explosive bomb) or a firearm silencer or muffler, the jury will necessarily be required to determine first whether an item meets the definition for a destructive device or a muffler or silencer in order to find that it is a "firearm" as defined in § 921(a)(3)(C) or (D). Under *Branch*, however, the jury verdict must specify only whether an item is a "firearm" but not whether it is one of these firearm types. The trial court is paradoxically interested only in the jury's finding of a "firearm," not of the enhanced weapon which the jury must find before it can find a "firearm." Where more than one weapon type is involved, the sentencing judge will have no idea what the jury actually found.[8]

Some firearms are defined to include scienter elements. § 921(a)(4)(C) defines "destructive device" to include "any combination of parts either designed or *intended* for use in converting any device into a destructive device . . . and from which a destructive device may be readily assembled."[9] "The term 'destructive device' shall not include . . . a rifle which the owner *intends* to use solely for sporting, recreational or cultural purposes." *Id.* *See also* § 921(a)(24) ("firearm silencer" and "firearm muffler" include "any combination of parts, designed or redesigned, and *intended* for use in assembling" a silencer or muffler, "and any part *intended* only for use in such

[8] Where the jury finds that an item is a "firearm" because it is a weapon that expels a projectile by action of an explosive, § 921(a)(3)(A), for purposes of the lowest level offense, it need not necessarily decide whether it is also a machinegun or destructive device (*see* § 921(a)(4)(B)), because the latter are defined to include weapons that expel projectiles.

[9] *See United States v. Tankersley*, 492 F.2d 962, 966-67 (7th Cir. 1974) (a bottle, firecracker, and paint thinner are not a destructive device without intent to assemble the combination).

assembly").[10] Criminal statutes ordinarily entrust the determination of a defendant's intent to the jury. *See Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) ("although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not . . . justify shifting the burden to him").

The Gun Control Act consistently treats specified firearm types as offense elements. Many offenses under Title I of the Act concern "firearms." *See generally* 18 U.S.C. §§ 922 & 924. Besides § 924(c), conduct with specific firearm types is made unlawful in §§ 922(a)(4), 924(a)(1)(B) (knowingly transport in commerce by a non-licensee a machinegun, destructive device, or short-barreled gun); §§ 922(b)(4), 924(a)(1)(D) (willful sale or delivery by licensee of machinegun, destructive device, or short-barreled gun); §§ 922(o), 924(a)(2) (knowingly transfer or possess machinegun); §§ 922(v)(1), 924(a)(1)(B) (knowingly manufacture, transfer, or possess semiautomatic assault weapon). The maximum imprisonment is generally ten years. § 924(a)(2).

Under the National Firearms Act of 1934 (ch. 757, 48 Stat. 1236), which was reenacted as Title II of the Gun Control Act of 1968, whether an item is a machinegun, short-barreled shotgun, or other narrowly-defined "firearm" has always been an element of the offense. 26 U.S.C. § 5845 (definitions of weapon types, all of which are defined as "firearms"), § 5861 (prohibited acts, *e.g.*, transfer of unregistered firearm). Maximum imprisonment is ten years. § 5871.

The courts have consistently held that the firearm types

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[10] Such parts may or may not be capable of immediate use as weapons, but "use" in § 924(c) includes activities such as trading firearms for drugs. *Smith v. United States*, 508 U.S. 223, 228 (1993).

defined in the Gun Control Act are offense elements. "The government must prove beyond a reasonable doubt that the recovered weapon satisfied the statutory requirements." *United States v. Spinner*, 152 F.3d 950, 957 (D.C. Cir. 1998) (insufficient evidence that rifle was semiautomatic assault weapon).[11]

It is often hotly contested whether an item is a firearm, machinegun, or other weapon defined in the Act.[12] *E.g.*, *United*

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[11] *See United States v. Meadows*, 91 F.3d 851, 856 (7th Cir. 1996) (failure to "prove every element of the statute" defining short-barreled rifle); *United States v. Whiting*, 28 F.3d 1296, 1309 (1st Cir. 1994) ("error in omitting [from jury instructions] a statutory element–the definition of the weapon–of the offense"); *United States v. Doucet*, 994 F.2d 169, 173 (5th Cir. 1993) (prosecutor "invited the jury to convict Doucet of a crime for which he was never indicted: possession of the unassembled parts of a machine gun").

[12] *See* Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice* (New York: Clark Boardman Callaghan/West Group, 1995, supp. 1999), Ch. 6, National Firearms Act: Definitions; *United States v. Hitt*, 981 F.2d 422, 423 (9th Cir. 1992) ("In the government's test, the rifle did fire more than one shot per trigger pull, but when Hitt's expert (witnessed by two police officers) tested it, it didn't"; expert attributed this to "a malfunction, perhaps because the internal parts were dirty, worn or defective."); *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.2d 591, 594 (D.C. Cir. 1996) (describing as "incredible" BATF's position that rifle receiver was machinegun); *United States v. Brady*, 710 F. Supp. 290, 293 (D. Colo. 1989) (trapping device "as a matter of practicality and common sense would never be used for that purpose [to fire ammunition] by a sane person"); *United States v. Seven Miscellaneous Firearms*, 503 F. Supp. 565 (D.D.C. 1980) (museum display items not NFA firearms); *United States v. Homa*, 608 F.2d 407, 409 (10th Cir. 1979) (fact finder determines whether item was designed as weapon or for smoke signaling); *United States v. Reindeau*, 947 F.2d 32, 33-36 (2d Cir. 1991) (error not to allow evidence that item was used as firecracker by local farm boys).

States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) (pistol-carbine kit not a short-barreled rifle). The testimony of experts and vigorous cross examination are typically utilized. For instance, the rifle in *United States v. Staples*, 971 F.2d 608, 609 (10th Cir. 1992), *rev'd on other grounds*, 511 U.S. 600 (1994), had no auto-sear (the sole function of which "is to permit automatic fire"); agents induced unreliable repeat fire by changing parts and using "soft-primer" ammunition. 971 F.2d at 613-14. The rifle never fired more than one shot per trigger pull while in defendant's possession. *Id.* at 614-15.

If the firearm type is a mere sentencing factor, then a sentencing court may find facts with which to impose not only thirty years, but also life imprisonment. § 924(c)(1) (second sentence) provides:

> In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or is a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.[13]

The use of the term "conviction" above is enlightening, and it is repeated in the third sentence of § 924(c)(1): "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection . . . ." Thus, one may

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[13] Similarly, § 924(o) provides:

> A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

be "convicted" of (not just sentenced for) committing the acts described in the first sentence, *e.g.*, use of a firearm or machinegun. "In the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction." *Deal v. United States*, 508 U.S. 129, 132 (1993).[14]

Branch suggested that a provision may be a sentencing factor rather than an offense element if it: (1) predicates punishment on conviction under another section; (2) multiplies the penalty received under another section; (3) provides guidelines for sentencing hearings; and (4) is titled as a sentencing provision. Pet. App. 80a, citing *United States v.*

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[14] This same use of the term "conviction" to refer to offense elements found by the jury was the basis for the holding in *Garrett v. United States*, 471 U.S. 773 (1985). 18 U.S.C. § 848(a)(1) penalizes engagement in a continuing criminal enterprise, "except that if any person engages in such activity after one or more prior *convictions* of him under this section," imposes a higher penalty. This described offense elements:

> At this point there is no reference to other statutory offenses, and a separate penalty is set out, rather than a multiplier of the penalty established for some other offense. This same paragraph then incorporates its own recidivist provision, providing for twice the penalty for repeat violators of this section. Significantly the language expressly refers to "one or more prior convictions . . . under this section." Next, subparagraph (2) . . . also refers to any person "who is convicted under paragraph (1) of engaging in a continuing criminal enterprise," again suggesting that § 848 is a distinct offense for which one is separately convicted.

Garrett, 471 U.S. at 780.

§ 849 (now repealed) has "starkly contrasting language which plainly is not intended to create a separate offense": the court sits without a jury to consider prior offenses and determines status as a dangerous special drug offender by a preponderance of evidence. *Id.* at 782.

Davis, 801 F.2d 754, 755 (5th Cir. 1986) (holding provision on possession of firearm by thrice-convicted felon, 18 U.S.C. App. § 1202(a), to create offense).[15]

Branch conceded that the first factor is not met here, because it held that punishment need not be predicated upon conviction for the predicate offense. Pet. App. 89a. It ignored the second and third factors, which are not met here because penalties are set forth in the same sentence of the same subsection, and § 924(c) does not provide guidelines for sentencing hearings.

As to the fourth factor, while § 924 is labeled "Penalties," it is filled with offense elements and independent offenses, which § 924(c)'s proscription on use of a "firearm" concededly is. Thus, the elements of "willfully" and "knowingly" are set forth in § 924(a) and other subsections. *See Bryan v. United States*, 524 U.S. 184, 188 (1998) (noting that the Firearms Owners' Protection Act "amended § 924 to add a scienter requirement as a condition to the imposition of penalties for most of the unlawful acts defined in § 922"). Complete offenses, some with structures identical to § 924(c),[16] are set

[15] "Enhancing a crime, however, is not the same as enhancing a sentence. Legislatures commonly grade offenses on the basis of severity, with higher grades constituting separate crimes rather than enhanced sentences." *Id.* at 756.

[16] Section 924(a)(6)(B) provides that a non-juvenile "who knowingly violates section 922(x)," which prohibits transfer of a handgun to a juvenile, "(i) shall be . . . imprisoned not more than 1 year," "and (ii) if the person sold" the handgun "knowing or having reasonable cause to know that the juvenile intended to" use the handgun to commit a violent crime, "shall be . . . imprisoned not more than 10 years . . . ." It would be unprecedented not to submit to the jury the issue of knowledge, which the Act elsewhere consistently treats as an element of less serious offenses.

forth in various parts of § 924.[17]

§ 924(j) is the most dramatic example of Congress' practice in setting forth offense elements in § 924 with a structure identical to that of § 924(c):

> A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall–
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
>
> (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

To construe murder and manslaughter as mere sentencing factors to be found by a preponderance of evidence would be a radical departure from due process and the right to jury trial. Yet under respondent's interpretation of a provision with this structure, the jury need only convict a defendant of causing a death through the use of a firearm in the course of a § 924(c) violation, and the court is then authorized at sentencing to find that the death was murder and to impose the death

E.g., §§ 922(a)(5), (b)(1), (2) & (3), (d), (f)(1), (i), (j).

[17] §§ 924(a)(1)(A) (false statement), 924(a)(3)(A) (false statement), 924(b) (transport firearm with intent to commit or knowledge of felony), 924(g) & (n) (travel with intent to violate certain laws and to transfer firearm in furtherance thereof), 924(h) (transfer of firearm knowing it will be used to commit certain crimes), 924(k) (smuggling firearm with intent to commit certain offenses), 924(l) (stealing firearm in commerce), 924(m) (stealing firearm from licensee).

sentence.[18]

In sum, the text and structure of § 924(c) makes clear that the specified firearm types are offense elements. Each and every other instance in the Gun Control Act which refer to these firearm types makes them elements of offenses.

B. As Recognized by Other Circuits, Jury Determination of Whether a Weapon Was "Used or Carried" Includes *What* Was Used or Carried

Pre-*Branch* circuit opinions held that the firearm types in § 924(c) are offense elements. They recognized that inherent in the jury function of determining "uses or carries" is the finding of *what* was used or carried. *See Bailey v. United States*, 516 U.S. 137, 148 (1995) (resolving "what evidence is required to permit a jury to find that a firearm had been used at all"). In a case where two weapons are in evidence, a jury in its deliberations may decide that a defendant used a revolver by pointing it, but did not "use" a machinegun stored in a locked safe, or that the item is not a "machinegun." The general verdict under *Branch* of a mere "firearm" enables the sentencing judge to find facts which nullify the jury's actual determination of whether a weapon was used or carried by usurping the jury function of determining what was used or carried..

In *United States v. Sims*, 975 F.2d 1225, 1230-31 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993), the indictment alleged a "firearm" count for guns found in one car, and a "machinegun" count for a machinegun found in another car.

[18] That such a reading would be contrary to Congress' intent is made clear by 18 U.S.C. §§ 3591, 3593, which guarantee the jury role in death sentence cases.

The jury convicted on both counts. The district court vacated the convictions on the machinegun count because the occupants of the car with the machinegun did not play a sufficient role in the drug transaction to satisfy § 924(c). *Id.* at 1232.

Sims held that where only one predicate offense exists, avoidance of double jeopardy allows conviction on only one count. *Id.* at 1233. The court explained:

> This may be accomplished prior to trial by consolidating those counts into a single section 924(c) count and submitting special interrogatories or a special verdict form to the jury, requiring that if the jury returns a guilty verdict on the gun charge, it must specify which category or categories of weapons it unanimously has found the defendant was using or carrying. Or, it may be accomplished by submitting the separate gun counts to the jury and, should there be more than one conviction, merging those convictions after trial.[19]

Id. at 1235. If the jury convicts the defendant of using *both* a firearm and a machinegun, the counts must be merged and the defendant sentenced for machinegun use. *Id.* at 1236. The court remanded the case for the district court to resolve "any outstanding issues of sufficiency of the evidence or *Pinkerton* liability related to the machine gun count." *Id.* at 1237-38.

United States v. Martinez, 7 F.3d 146, 147-48 & n.1 (9th Cir. 1993) agreed that where one predicate count, one machinegun count, and one firearm count are charged, the court should either submit separate counts to the jury and merge any multiple convictions, or "submit one section 924(c)(1) charge to

[19] The Fifth Circuit initially agreed with *Sims* in *United States v. Correa-Ventura*, 6 F.3d 1070, 1087 n. 35 (5th Cir. 1993) ("the jury may well be required to agree on which type of weapon was used").

the jury to specify which weapon or weapons the defendant used or carried." The district court had dismissed the machinegun count based on defendant's argument that "the pistol had a closer relationship to the predicate offense than did the machine gun." *Id.* at 149. While *Martinez* reinstated that count, it might well not have done so after *Bailey*.

In *United States v. Melvin*, 27 F.3d 710, 714 (1st Cir. 1994), "all parties concede that the jury mistakenly was not asked to identify which of the six firearms at issue in this case—ranging from machine guns to handguns—underlay its guilty verdict . . . ." *Id.* at 711. All were alleged in a single count. The government agreed that a 30-year sentence could be imposed "only if the jury specifically identifies a machine gun or silencer," but argued that the jury "implicitly" found machinegun use. *Id.* at 714. However, "we may not exclude beyond a reasonable doubt the possibility that the jury rendered a guilty verdict . . . based on a determination that the defendants possessed only a handgun . . . ." *Id.* at 715. Thus, "the jury's verdict fails to establish, beyond a reasonable doubt, that the jurors found that the defendants violated § 924(c) through use of weapons subject to a term of imprisonment greater than five years."[20] *Id.*

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[20] *United States v. Rodriguez*, 841 F. Supp. 79; 81 (E.D.N.Y. 1994), *aff'd* 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995), rejected the argument that "the enhanced penalty for use of a firearm equipped with a silencer is not a matter for the jury in determining whether guilt has been proved, but only for the court in sentencing." The court noted about *United States v. Harris*, 959 F.2d 246, 258-59 (D.C. Cir.), *cert. denied*, 506 U.S. 932 (1992):

> The *Harris* jury was asked to decide (1) whether the defendant knowingly possessed and used a firearm, and (2) whether that firearm was, in fact, a machinegun. . . . So too in this case, the jury will have to find . . . that the firearm at issue was equipped with a silencer.

Rodriguez, 841 F. Supp. at 81-82.

Identification of the firearm type in the indictment and jury instructions has been the accepted standard and practice. *E.g.*, *Smith v. United States*, 508 U.S. 223, 226 (1993) (indictment alleged and jury found that defendant "knowingly used the MAC-10 and its silencer"); *United States v. Moore*, 958 F.2d 310, 314 (10th Cir. 1992) ("machinegun" use was alleged in the indictment, was a "statutory offense[]," was supported by sufficient evidence for the verdict, and was the "conviction" on which the court was to enter judgment).[21]

In *United States v. Alerta*, 96 F.3d 1230, 1234 (9th Cir. 1996), the jury instruction charged defendant with use of "pistols" and "machineguns," but the verdict did not specify that a machinegun was used. *Alerta* held:

> It is therefore possible that the jury found only that Alerta used one or more of the weapons that were not machine guns, in which case the requisite consecutive sentence for Count 5 would be 5 years, not the 30-year sentence that Alerta received. . . .
>
> Because of the immense consequences that follow a determination whether a firearm used in violation of section 924(c)(1) is an ordinary firearm or, at the other extreme, a machine gun, we have stated that a jury finding on that issue is required.

Id. at 1234-35.

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[21] *See United States v. Feinberg*, 98 F.3d 333, 339 (7th Cir. 1996) (jury instruction that government must prove that "the defendant used or carried a destructive device"); *United States v. Shuler*, 181 F.3d 1188, 1189 (10th Cir. 1999) (machinegun).

In short,"the fully automatic character of the firearm must be found by the jury; that is to say, it is an element of the crime." *Id.* at 1235. A 30-year sentence cannot be imposed unless the jury finds machinegun use, "despite the very strong evidence that Alerta used or carried a machinegun. '[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.'" *Id.* at 1236 (citation omitted).[22]

Before *Branch*, all of the circuits to rule on the issue relied on the plain text to find that firearm type is an offense element. Two circuits have followed *Branch* without offering any original analysis. *United States v. Alborola-Rodriguez*, 153 F.3d 1269, 1271-72 (11th Cir. 1998), *cert. denied*, 525 U.S. 1030 (1999); *United States v. Shea*, 150 F.3d 44, 51-52 (1st Cir.), *cert. denied*, 525 U.S. 1030 (1998) (contradicting, without citing, *Melvin*, *supra*, which was binding circuit precedent). Both involved firearm types (a short-barreled shotgun and an assault weapon) with sentences of only 10 years, and thus do not consider whether a 30-year "sentence enhancement" is "a tail which wags the dog of the substantive offense," *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).[23]

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[22] *See United States v. Perez*, 129 F.3d 1340, 1342 (9th Cir. 1997) (indictment alleged pistols with silencers "or" an assault weapon; jury must find firearm type); *United States v. Shepard*, No. 94-5307, 1995 U.S. App. LEXIS 5802, *9-12 (4th Cir. 1995) (jury found use of sawed-off shotgun "and" pistols; disjunctive "or" not used); *United States v. Wills*, 88 F.3d 704, 719 (9th Cir.), *cert. denied*, 519 U.S. 1000 (conviction for firearm "and" destructive device).

[23] Two other circuits suggest in dictum that firearm type is not an element, but in both cases the firearm type was found by the jury. *United States v. Gilliam*, 167 F.3d 628, 638 (D.C. Cir.), *cert. denied*, 145 L Ed. 2d. 100 (1999); *United States v. Eads*, 191 F.3d 1206, 1214 (10th Cir. 1999), *petition for cert. pending*, No. 99-6907 (filed Nov. 1, 1999).

As noted, it is for the "jury to find that a firearm had been used," *Bailey*, 516 U.S. at 148. *Branch* remanded this case because the *district court* had only found "possession" of specified firearms but not "use" as defined in *Bailey*. It authorized the sentencing judge to make findings not charged in the indictment or found by the jury. Pet. App. 85-86a. By contrast, in other circuits where convictions for use of specified firearms were reversed on *Bailey* grounds, the test on remand has been whether jury verdicts under indictments charging use of specified firearms were based on sufficient evidence, i.e., proof beyond a reasonable doubt that such specified firearm was used.[24]

The Fifth Circuit exacerbates this departure from *Bailey* by authorizing the sentencing court to attribute another person's use of a specified firearm to a defendant. While *Branch* was silent on the source for this novel doctrine, the district court based it on *Pinkerton v. United States*, 328 U.S. 640 (1946) (Pet. App. 125-27a), and *Castillo* sanctions this theory.[25] Pet.

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[24] *E.g.*, *United States v. Santos*, 84 F.3d 43, 46-47 & n.3 (2d Cir. 1996) (insufficient evidence for verdict finding use of "firearms," including handgun equipped with silencer); *United States v. Garcia*, 77 F.3d 274, 276-77 (9th Cir. 1996) ("prior to *Bailey*, the jury could have properly inferred that Garcia 'used' the machinegun"); *United States v. Thompson*, 82 F.3d 849, 851-52 (9th Cir. 1996) (improper instruction on "use" of firearm equipped with silencer); *United States v. Farris*, 77 F.3d 391, 395 (11th Cir.), *cert. denied*, 519 U.S. 896 (1996) (issue for finder of fact).

[25] Besides *Pinkerton* liability, the district court found that Castillo and Craddock carried a hand grenade on April 19 (Pet. App. 168a). Yet

App. 158-60a. Yet *Pinkerton*, 328 U.S. at 645, requires the jury to find that a defendant is responsible for the act of a co-conspirator, and what "the record demonstrates" absent that finding is irrelevant. *Pereira v. United States*, 347 U.S. 1, 10 n. (1954). Here, the jury convicted each defendant under instructions asking if "the *Defendant under consideration* knowingly used or carried a *firearm* during and in relation to" the predicate offense.[26] J.A. 29. In order to convert an element into a sentencing factor, the Fifth Circuit has transformed *Pinkerton* from a doctrine about what juries might find under appropriate instructions into a doctrine in which the sentencing judge usurps that traditional jury power.

Branch-Castillo push the *Bailey* and *Pinkerton* envelopes outside any limits sanctioned by this Court. This is avoided by adherence to the better-reasoned circuit precedent, which establishes that the jury must find what was used or carried.

C. The States Have Traditionally Treated Firearm Types as Offense Elements

Section 924(c) is rooted in the common law and State

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the indictment charged them with using firearms on February 28. "We would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." *Richardson v. United States*, 119 S. Ct. 1707, 1711 (1999). Nor may a defendant be sentenced for assaulting Y on Wednesday if only convicted of assaulting X on Tuesday.

[26] If the jury does not convict a defendant under a *Pinkerton* instruction, the acts of other parties cannot be attributed to him. *Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949); *id.* at 621 (Frankfurter, J., dissenting).

law. It was an indictable offense at common law to go armed with the intent of committing crimes of violence.[27] Such common-law offenses were recognized in the early Republic.[28] Further, the States enacted enhanced penalties for misuse of specified weapons.[29]

The States have long punished misuse of the firearm types specified in § 924(c). Several adopted the Uniform Machine Gun Act drafted by the National Conference of Commissioners of Uniform State Laws in 1932.[30] Ark. Stat. §

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[27] If any man "Ride[s] Armed covertly or secret with Men of Arms against any other to Slay him, or Rob him, or Take him, or Retain him till he hath made Fine and Ransom . . ., it . . . shall be judged Felony or trespass, according to the Laws of the Land of old time used . . . ." Edward Coke, *The Third Part of the Institutes of the Laws of England* 160 (6th ed. 1680). An affray was committed "where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law . . . ." William Hawkins, *Pleas of the Crown*, I, 488 (8th ed., London 1824). Carrying arms "malo animo" (with an evil mind) was a crime. *Rex v. Knight*, Comb. 38, 90 Eng. Rep. 330 (K. B. 1686).

[28] *State v. Huntley*, 25 N.C. (3 Iredell) 284 (1843) (indictment for affray alleging "pistols, guns, knives, and other dangerous and unusual weapons" and intent to kill). *Cf. Simpson v. State*, 13 Tenn. Reports (5 Yerg.) 356, 358-60 (1833) (indictment for affray insufficient unless it also alleges fighting in a public place).

[29] A Texas law provided: "If any person be killed with a bowie-knife or dagger, under circumstances which would otherwise render the homicide a case of manslaughter, the killing shall nevertheless be deemed murder, and punished accordingly." *Cockrum v. State*, 24 Tex. 394, 401 (1859) (showing that weapon type was a jury question).

[30] Mont. Code Anno., § 45-8-301 (1999) (Annotator's Note) (*and see* § 45-8-303); Md. Acts 1933, ch. 550, *currently* Md. Ann. Code art. 27,

5-73-211 (1999) is typical: "Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is declared to be a crime punishable by imprisonment in the State Penitentiary for a term of not less than twenty (20) years."[31]

The Appendix to this brief provides citations for numerous State laws punishing use of different weapons in crimes. It is very rare for the weapon type not to be an offense element, and the law explicitly so states when it is not. *E.g.*, *McMillan*, 477 U.S. at 81 n.1.

Some State laws are structurally the same as § 924(c). Ca. Penal Code § 12022(a) provides that (1) any person convicted of being "armed with a firearm in the commission" of a felony shall "be punished by an additional term of one year," and (2) "if the firearm is an assault weapon . . . or a machinegun," the additional term "shall be three years." The specified firearms are offense elements. *People v. Bland*, 10 Cal. 4th 991, 1003, 898 P.2d 391 (1995) (the evidence "supported the jury's finding that defendant fell within the statutory prohibition of being armed with an assault weapon in committing the felony drug possession").[32]

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§ 373 (1999); Conn. Gen. Stat. § 53-202 (1999); Va. Code § 18.2-289 (1999).

[31] The uniform "'Sawed-off' Shotgun and 'Sawed-off' Rifle Act" tracks the same language. *E.g.*, Va. Code § 18.2-300(A); *Dillard v. Commonwealth*, 28 Va.App. 340, 343, 504 S.E.2d 411 (1998) (weapon type is offense element).

[32] Ore. Rev. Stat. § 161.610(2) (1997) provides that the use of a firearm in a felony "may be pleaded in the accusatory instrument and proved at trial as an element in aggravation of the crime." Subsection

Fla. Stat. § 775.087(3)(a)1 (1999) provides that a person who is convicted of several named violent felonies "and during the commission of the offense, such person possessed" a semiautomatic firearm with high-capacity magazine or a machine gun, "shall be sentenced to a minimum term of imprisonment of 15 years." *Williams v. State*, 724 So. 2d 652, 653 (Fla. 1999) held that, to impose the enhancement, "the information should have charged [defendant] with possession of a semi-automatic weapon and had the case gone to the jury, it would have had to have specifically found he possessed a semi-automatic weapon."[33]

In sum, by its language and structure, § 924(c) specifies firearm types as offense elements. Beginning with the National Firearms Act of 1934 and continuing through the Gun Control

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(4)(a) imposes five-years for a first conviction, "except that if the firearm is a machine gun, short-barreled rifle, short-barreled shotgun or is equipped with a firearms silencer, the term of imprisonment shall be 10 years." "Although the challenged statute is denominated an enhanced penalty statute, in effect it creates a new crime." *State v. Wedge*, 293 Or. 598, 608, 652 P.2d 773 (1982). A finding by the court rather than the jury of firearm use violates the right to jury trial. *Id.* at 603. *See State v. Black*, 161 Ore. App. 662, 663 987 P.2d 530 (1998) (short-barreled shotgun "pleaded as aggravated offense").

[33] Haw. Rev. Stat. § 706-660.1(3) (1993) imposes a mandatory minimum sentence on a person who possesses or uses a semiautomatic or automatic firearm in a felony. Applicable thereto is "the due process requirement that aggravating circumstances which support an 'enhanced' sentence be alleged in the charging document." *State v. Kang*, 84 Haw. 352, 357, 933 P.2d 1386, 1391 (1997) (failure to allege "aggravating circumstance" that firearm was "semiautomatic or automatic"). *See State v. Vanstory*, 91 Haw. 33, 50-51, 979 P.2d 1059 (1999) (failure to instruct jury on definition of semiautomatic firearm precluded enhanced sentence).

Act of 1968 and its various amendments, Congress has consistently treated machineguns and other firearm types as offense elements. State practice has been the same. The Fifth Circuit's view departs from the text, from better-reasoned precedent, and from long-standing federal and State tradition.

II. CONSTITUTIONAL DOUBT IS RAISED UNDER JONES V. UNITED STATES, 526 U.S. 227 (1999)

The Fifth Circuit decisions here conflict with the interpretative rules regarding Fifth and Sixth Amendment rights set forth in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed.2d 311 (1999) and its forebears. *Jones* held that, where a statutory provision could be read as an offense element or as a sentencing factor, the doctrine of constitutional doubt requires the former reading to avoid a possible violation of the rights to due process and jury trial. *Jones* mandates the interpretation that the firearm types in § 924(c) are offense elements which must be charged in the indictment and found by the jury.

Jones concerns the federal carjacking statute, 18 U.S.C. § 2119, which is structurally identical to § 924(c):

18 U.S.C. § 2119	18 U.S.C. § 924(c)(1)
Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, *shall* (1) be fined under this title or imprisoned not more than 15 years, or both, (2) *if* serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and (3) *if* death results, be fined under this title or imprisoned for any number of years up to life, or both.	Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, *shall* . . . [1] be sentenced to imprisonment for five years, and [2] *if* the firearm is a short-barreled rife, short-barreled shotgun to imprisonment for ten years, and [3] *if* the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

(Italics and bracketed numbers added.)

In short, whoever commits act A "shall" be sentenced to X, and "if" he commits aggravating act B, "shall" be sentenced to Y.[34] The issue is whether act B is an element or a sentencing

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[34] § 924(c) has been amended, P.L. 105-386, 112 Stat. 3469 (1998), but remains structurally the same as the prior version.

factor, "given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones*, 119 S. Ct. at 1219. *See* U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . , nor be deprived of life, liberty or property, without due process of law"); amend. VI ("In all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation").

While not alleged in the indictment or jury instructions, serious bodily injury was found by the district court in *Jones* by a preponderance of the evidence, and the defendant was sentenced to 25 years. *Id.* at 1218. "§ 2119 at first glance has a look to it suggesting that the numbered subsections are only sentencing provisions," but that is a "superficial impression [which] loses clarity when one looks at" the penalty provisions. *Id.* at 1219. *Jones* explained:

> These not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (e.g., force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit.

Id. With § 924(c), the penalty range increases *sixfold*, i.e., from 5 to 30 years, and may extend to life imprisonment in event of a subsequent offense or (under §924(o)) a conspiracy.

Moreover, if a statute is unclear about whether a fact is to be treated as element or penalty aggravator, comparison with

other statutes is appropriate, "on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Id.* at 1220. Traditionally, Congress and the States treated serious bodily injury as an element of the offense of aggravated robbery. *Id.* As shown above, Congress and the States traditionally treated the firearm types at issue here as offense elements.

Branch allows that "the text of § 924(c) forecloses neither of these two competing readings of the statute." Pet. App. 81a. In that event, as *Jones* explains:

> Any doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule, repeatedly affirmed, that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

119 S. Ct. at 1222 (citations omitted).

The government's construction opened the statute to constitutional doubt under the due process and jury guarantee clauses. *Id.* To begin with, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

Mullaney v. Wilbur, 421 U.S. 684, 686 & n.3 (1975) invalidated a murder statute providing that malice is presumed on proof of intent to kill resulting in death, except that the crime is manslaughter if defendant proves provocation in the heat of passion. The rebuttable presumption relieved the State of its due process burden to prove every element of the crime beyond a reasonable doubt. *Mullaney* stated:

> Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Id. at 697.

Patterson v. New York, 432 U.S. 197, 205-06 (1977) upheld a definition of murder as causing death with intent, subject to an affirmative defense of extreme emotional disturbance. There was no presumption of malice, and at common law the prosecution need not disprove beyond a reasonable doubt every fact constituting an affirmative defense. *Id.* at 202, 210-11. The Court noted:

> This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard.

Id. at 210.[35] This is open to the broad reading that "the State lacked the discretion to omit 'traditional' elements from the

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[35] *Patterson* reaffirmed *Mullaney's* holding that every ingredient of an offense must be proven beyond a reasonable doubt, and the burden of proof may not be shifted to the defendant "by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Id.* at 215.

definition of crimes and instead to require the accused to disprove such elements." *Jones*, 119 S. Ct. at 1223.

McMillan, 477 U.S. at 88, held that the fact of visible possession of a firearm may be a sentencing factor if such finding does not trigger a potential sentence outside the range otherwise prescribed. The provision did not increase the maximum authorized penalty, but raised the minimum sentence to 5 years.[36] This enhancement was smaller than the 20- and 10-year maximum sentences authorized for the actual offenses, and thus "the statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. The claim that visible possession is really an offense element "would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, . . . but it does not." *Id.*

"The result [in *McMillan*] might have been different if proof of visible possession had exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact."[37] *Jones*, 119 S. Ct. at 1223-24.

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[36] Five years were to be added to the sentence for certain crimes if the judge found, by a preponderance of the evidence, visible firearm possession, which "shall not be an element of the crime." *Id.* at 81 & n.1, 83.

[37] *Edwards v. United States*, 523 U.S. 511, 512-13 (1998) involved a jury finding of "cocaine or cocaine base" under 21 U.S.C. § 841. The district court applied the Sentencing Guidelines to find as "relevant conduct" that the substance was cocaine base and imposed a higher sentence than authorized for cocaine. *Id.* at 514. "Petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy." *Id.* at 515. The Court cites

Certainly the tail wags the dog if § 924(c) is interpreted such that the substantive offense is only 5 years and the "enhancement" is 30 years.

Based on the above precedents, *Jones* states the following as the principle under which the government's construction of the statute may violate the Constitution:

> *[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.* Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

119 S. Ct. at 1224 n.6 (emphasis added).

Interpretation of the enhancement provisions as mere sentencing factors reduces the jury function to "low-level gatekeeping," i.e., the jury's fact finding necessary for a 15-year sentence opens the door to a judicial finding sufficient for a 25 year sentence. *Id.* at 1224. Here, interpretation of firearm types as sentencing factors reduces the jury to even lower-level gatekeeping–the jury's fact finding for a 5-year sentence opens the door to a judicial finding triggering a 30-year sentence.

Trial by jury is secure only "so long as this palladium remains sacred and inviolate, not only from all open attacks, . .

United States v. Orozco-Prada, 732 F.2d 1076, 1083-1084 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984) to the effect that a "court may not sentence defendant under statutory penalties for cocaine conspiracy when jury may have found only marijuana conspiracy." That parallels the situation here.

. but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial . . . ." *Id.* at 1225, quoting 4 Blackstone, *Commentaries* *342-344. The judicial transformation of an offense element into a sentencing factor may be tempting in emotional cases where juries acquit defendants of serious charges. Here, the jury acquitted the defendants of murder charges and convicted them only of aiding and abetting manslaughter and what was considered as a minor "gun count." The acquittals were effectively nullified when, contrary to every circuit to have considered the issue, the court elevated the "gun count" to an offense with a penalty one might receive for murder.[38]

Almendarez-Torres v. United States, 523 U.S. 224 (1998) held that recidivism need not be charged in an indictment for unlawful reentry after deportation in violation of 8 U.S.C. § 1326. That provision punished a deported alien returning to the United States with two years imprisonment or, if the deportation was after conviction for an aggravated felony, with up to 20 years. "At the outset, we note that the relevant statutory subject matter is recidivism. That subject matter–prior commission of a serious crime–is as typical a sentencing factor as one might imagine." *Id.* at 230. "The sentencing factor at issue here–recidivism–is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243. This is not so regarding § 924(c).

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[38] "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The jury guarantee reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id. See United States v. Gaudin*, 515 U.S. 506, 510-11 (1995).

"Unlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 119 S. Ct. at 1227.

Interpreting recidivism as an offense element risked unfair prejudice, for the jury would know of the conviction for an aggravated felony. *Almendarez-Torres*, 523 U.S. at 235. "[W]e do not believe, other things being equal, that Congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested." *Id.*

It is quite the opposite with § 924(c). First, it creates no unfair prejudice for the jury to know the alleged firearm type. Not only must the specific firearm be introduced into evidence or otherwise proven, under § 921(a)(3)(C) & (D) the jury must determine first that an item is a destructive device or silencer before it can determine that it is even a "firearm." Second, as shown above, the weapon types in § 924(c), far from being "facts that are almost never contested," are facts that very frequently are contested. The definitions of various firearm types are technical, and expert testimony is the norm. Certain items are not "firearms" unless the defendant has a certain intent.

The majority in *Almendarez-Torres* did not dispute the statement in the dissenting opinion by Justice Scalia (joined by Justices Stevens, Souter, and Ginsburg), that in some instances recidivism is an offense element "added to another crime":

> [R]ecidivism is recited in a list of sentence-increasing aggravators that include, for example, . . . use of a firearm that is a machine gun, or a destructive device, or that is equipped with a silencer (18 U.S.C. § 924(c) [second sentence]) . . . . It would do violence to the text

> to treat recidivism as a mere enhancement while treating the parallel provisions as aggravated offenses, which they obviously are.

Id. at 262 & n. 3.

Jones, 119 S. Ct. at 1228, concludes with the following holding which is applicable here:

> In sum, the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions. This is done by construing § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

In sum, to the extent that § 924(c) is susceptible to two meanings, it must be construed to avoid constitutional problems arising under the Fifth and Sixth Amendments. This rule of construction buttresses the plain reading of the statutory text that firearm type is an element of the offense under § 924(c).

III. READING FIREARM TYPES AS OFFENSE ELEMENTS IS REQUIRED BY DUE PROCESS AND SUPPORTED BY LEGISLATIVE HISTORY

A. "Legislative History" Does Not Override The Rules of Constitutional Doubt and Lenity

Branch appealed to "legislative history" to hold that a firearm type is a sentencing factor and not an offense element. Pet. App. 81-83a. *Castillo* ignored the jurisprudential analysis set forth in *Jones* and distinguished *Jones* solely on the basis of

legislative history (Pet. App. 154-55a):

> In *Jones*, the legislative history contained conflicting indications of whether Congress intended for 18 U.S.C. § 2119, the statute at issue, to lay out three distinct offenses or a single crime with three maximum penalties. See *Jones*, . . . 119 S. Ct. at 1221 . . . . In contrast, the legislative history of § 924(c)(1) discloses that Congress consistently referred to the machine gun clause as a penalty and never indicated that it intended to create a new, separate offense for machine guns. See *Branch*, 91 F.3d at 739. Accordingly, we decline to reconsider our prior decision that the type of firearm used or carried is a sentencing enhancement, and not an element of the offense.[39]

Jones did not leave the door open for "legislative history" mechanically to override the doctrine of constitutional doubt.[40] Indeed, this Court rejected the view of the court of appeals in *Jones* that "bodily injury" is a mere sentencing factor based on legislative history, including committee reports and

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[39] *Cf. United States v. Nuñez*, 180 F.3d 227, 233 (5th Cir. 1999) and *United States v. Chestaro*, 197 F.3d 600, 607-08 (2d Cir. 1999) (applying *Jones* to hold the following weapon component of 18 U.S.C. § 111(b) to be an element of the offense: "Enhanced penalty.–Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon" is subject to 10 years imprisonment).

[40] *See United States v. Allen*, 190 F.3d 1208, 1213 (11th Cir. 1999) (rejecting legislative history in favor of *Jones* analysis). *Allen* construed 18 U.S.C. § 1791, which provides (a) that it is unlawful for an inmate to possess a "prohibited object,"and (b) that "the punishment for an offense under this section" is 5 years imprisonment if the object is specified in subsection (d), which in turn specifies an object "intended to be used as a weapon." *Allen* held the object to be an offense element.

floor debates referring to "enhanced penalties for an apparently single carjacking offense." 119 S. Ct. at 1218-19.

Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) teaches about "legislative history" in criminal statutes:

> There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear. Moreover, were we to find § 5322(a)'s "willfulness" requirement ambiguous . . ., we would resolve any doubt in favor of the defendant. . . . *Crandon v. United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.")[41]

Similarly, "principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of . . . legislative history." *Hughey v. United States*, 495 U.S. 411, 422 (1990). *Garcia v. United States*, 469 U.S. 70, 78 (1984)

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[41] *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) ("the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should"); *id.* at 307, 309 (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.) ("it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history"; the fiction that one is presumed to know the law "descends to needless farce when the public is charged even with knowledge of Committee Reports"). "One can hardly imagine an 'implication from legislative history' that is 'unmistakable'—*i.e.*, that demonstrates agreement to a proposition by a majority of both Houses and the President—unless the proposition is embodied in statutory text to which those parties have given assent." *Tafflin v. Levitt*, 493 U.S. 455, 472 (1990) (Scalia, J., concurring, joined by Kennedy, J.).

eschewed "some type of reverse parol evidence rule, where oral statements were elevated above enacted language in determining the meaning of the statute."

The underlying premise of *Castillo*, Pet. App. 154a, is that alleged "legislative history" overrides the doctrine of constitutional doubt. The result is that two statutes with identical structures–§ 924(c) and the statute in *Jones*–are subject to opposite interpretations because of the Fifth Circuit panel's rendition of floor speeches in Congress. Under this discordant linguistic methodology, citizens may not rely on uniformity in the language or sentence structure of criminal laws, but are subject to prosecution based on a court's *post hoc* portrayal of "legislative history."

Branch conceded that the text "forecloses neither of these two competing readings of the statute." Pet. App. 81a. *United States v. Bass*, 404 U.S. 336, 347-48 (1971) explained that, in such a situation, "doubts are resolved in favor of the defendant":

> When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. . . . First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Id. (citations and quotation marks omitted).

Bass concluded that "Congress has not 'plainly and unmistakably' . . . made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce." *Id.* at 348-49. Nor has Congress "plainly and unmistakably" made firearm type a mere sentencing factor.

The rule of "avoiding constitutional decisions where possible" was applied to interpret §924(c) narrowly in *Simpson v. United States*, 435 U.S. 6, 12 (1978) (avoiding double jeopardy issue). *Simpson* appealed to legislative history to read the statute narrowly and in accord with the rule of lenity. *Id.* at 13-14. "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.* at 15.

The same principles were applied in *Busic v. United States*, 446 U.S. 398, 405-06 (1980) (§ 924(c) adopted as a result of a floor amendment; as there were no committee reports or hearings, one could only "search for clues to congressional intent in the sparse pages of floor debate."). A similar situation existed when the enhanced weapon elements were adopted in 1986. *See infra.*

In sum, *Branch* and *Castillo* are inconsistent with the teachings of *Jones* and its forebears about how criminal statutes must be construed. This Court has never suggested that legislative history overrides any consideration of the doctrine of constitutional doubt or the rule of lenity, both of which require that the firearm types specified in § 924(c) be construed as offense elements.

B. The Legislative History Indicates that § 924(c) Created Elements, Not Sentencing Factors

As a matter of constitutional jurisprudence, avoiding possible violation of the rights to due process and jury trial takes precedence over "legislative history" as a tool to construe criminal statutes. That said, *Branch* misread the legislative history here, which indicates that the firearm types are offense elements.

§ 924(c) was originally enacted in the Gun Control Act of 1968, P.L. 90-618, § 102, 82 Stat. 1213 (1968):

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

This version of § 924(c) "creates an offense distinct from the underlying federal felony." *Simpson*, 435 U.S. at 10. *See id.* at 13-14 (adoption of § 924(c) in 1968 Act).

The Comprehensive Crime Control Act of 1984, P.L. 98-473, § 1005, 98 Stat. 1837, 2138 (1984), amended § 924(c) to impose a mandatory 5-year sentence and to restrict coverage to federal crimes of violence. "Section 924(c) sets out an offense . . . and is not simply a penalty provision." S. Rpt. 98-225, 314, in 1984 U.S. Code Cong. & Admin. News 3182, 3490.

The clauses specifying firearm types were added by the Firearms Owners' Protection Act ("FOPA"), P.L. 99-308, 100 Stat. 449, 457 (1986), which provided in part:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, *and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten years*. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years, *and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for twenty years*. (Emphasis added.)

§ 1 of FOPA stated: "The Congress finds that–(B) the rights of citizens–(C) against . . . double jeopardy, and assurance of due process of law under the fifth amendment . . . require additional legislation to correct existing firearms statutes . . . ." 100 Stat. 449. Congress intended that FOPA be strictly construed to avoid due process problems.

No report and no member of Congress stated that a machinegun or firearm silencer or muffler is a sentencing factor and not an element. The use of the term "enhanced penalty," *Branch*, Pet. App. 81-83a, settles nothing. *See Jones*, 119 S. Ct. at 1221 (only "*assuming* that 'penalty enhancement' was meant to be synonymous with 'sentencing factor,'" the Court "find[s] the quoted statements unimpressive").[42] Offenses with

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[42] *See Thompson/Center Arms*, 504 U.S. at 517-18 (plurality opinion by Souter, J., joined by the Chief Justice and O'Connor, J.) ("nor are we helped by the NFA's legislative history, in which we find nothing to support a conclusion one way or the other . . . . [W]e are left with an

aggravated elements (like murder) always have "enhanced penalties" over lesser offenses (like manslaughter).

The provision at issue first appeared in two House bills–H.R. 4227, which was defeated, and H.R. 945 (the Volkmer substitute), which was enacted as FOPA. 132 Cong. Rec. H1752-53, H1757 (Apr. 10, 1986). While H.R. 4227 would have added only a machinegun clause, *id.* at H1674 (Apr. 9, 1986), the Volkmer substitute included coverage of a machinegun and a firearm silencer or muffler. *Id.* at H1677. No committee report existed on the Volkmer substitute since it came to the House floor through a discharge petition.

The House Judiciary Committee report on H.R. 4227 stated that it: "Provides a mandatory prison term of ten years for using or carrying a machine gun during and in relation to a crime of violence or a drug trafficking offense, and a mandatory twenty years for any subsequent offense." H.Rpt. 99-495, 99th Cong., 2d Sess., 2 (1986); *see id.* at 28, 41. Although § 924(c) "is frequently referred to as a penalty enhancement provision it is in reality a separate offense . . . ." *Id.* at 10.

On the House floor, Rep. Bill Hughes noted that H.R. 4227 "strengthens the mandatory prison sentences for firearms used in the commission of crime—violent crime, drug trafficking crime or if a machinegun is used in the commission of a violent offense or a drug trafficking offense." 132 Cong. Rec. H1646 (Apr. 9, 1986). Rep. Harold Volkmer explained that his substitute "includes stiff mandatory sentences for the use of

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ambiguous statute. . . . It is proper, therefore, to apply the rule of lenity."); *id.* at 521 (Scalia, J., concurring, joined by Thomas, J.) ("that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history" is "particularly inappropriate in determining the meaning of a statute with criminal application").

firearms, including machineguns and silencers, in relation to violent or drug trafficking crimes." *Id.* at H1652 (1986). Rep. Moore added that the Volkmer substitute "provides a 5-year mandatory prison term for drug traffickers who use or carry a firearm" and "a mandatory 10-year prison term for using or carrying a machinegun or silencer in the commission of a violent crime or drug trafficking offense." *Id.* at H1659.[43]

The Volkmer substitute passed the House and was then debated in the Senate. Senator Hatch, FOPA's floor manager, provided an analysis stating that "Existing law" included: "Mandatory penalties for carrying or using firearms . . . in the commission of Federal Crimes: Prohibits the carrying or use of a firearm during and in relation to a Federal crime of violence. Imposes mandatory sentences of 5 years imprisonment . . . ." 132 Cong. Rec. S5351, 5353 (May 6, 1986). The "House version" was described as: "Provides mandatory penalties of 10 years for first offenders . . . if the firearm carried or used in violation of section 924(c) is a machinegun." *Id.* Senator McClure, FOPA's chief Senate sponsor, explained that the bill would:

> Require mandatory penalties for the use of a firearm during a Federal crime. Our colleagues in the

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[43] Rep. Wirth supported "the expansion of mandatory sentencing to those persons who use a machinegun in the commission of a violent crime or who carry a firearm in connection with a narcotics-related crime." *Id.* at H1666. Rep. Gallo stated that the Volkmer bill imposes "a 5-year mandatory prison sentence for any person who uses a firearm during commission of a drug trafficking crime; provides a mandatory prison term of 10 years for using a machinegun during commission of a crime." *Id.* Rep. Miller stated that H.R. 4227 "says if you deal drugs and use a gun, you go to jail for at least 5 years. If you use a machinegun in your criminal activities, you get 10 years in jail." *Id.* at H1747.

> House have added additional mandatory penalties . . . for the use of a machinegun or silencer in a violent Federal felony.

Id. at S5363. Thus, use of a "firearm" and of a "machinegun" brought "mandatory penalties," but the latter term did not imply that one or the other weapon type was not an offense element. The Senate concurred in the House amendments. *Id.* at S5366.

Branch concluded: "Noticeably absent from both the House Report and the floor debates was any discussion suggesting the creation of a new offense." Pet. App. 82a. More "noticeably absent," however, was any suggestion that the firearm type is not an element but is to be determined by the judge at sentencing by a mere preponderance of evidence.[44]

The Anti-Drug Abuse Act, P.L. 100-690, § 6460, 102 Stat. 4181, 4373-74 (1988) increased the penalty for machinegun and silencer use to thirty years and, for a subsequent conviction, to "life imprisonment without release." *See* 134 Cong. Rec. S17360, 17365 (Nov. 10, 1988) (Judiciary Committee analysis paraphrasing amendment).

The Crime Control Act, P.L. 101-647, § 1101, 104 Stat. 4789, 4829 (1990) amended the first sentence to insert, after "five years," the phrase "and if the firearm is a short-barreled rifle, [or] short-barreled shotgun to imprisonment for ten years". It also inserted after "a machinegun" wherever it appeared the terms "or a destructive device". *See* H. Rep. No. 681, 101st

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[44] "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Indus. Inc.*, 446 U.S. 578, 592 (1980).

Cong., 2d Cong., 107 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6511 (paraphrasing amendment).

Branch again argues from the negative that "at no point did Congress indicate that it intended to create a new, separate offense for those weapons." Pet. App. 83a. To the contrary, Congress added these new weapon types alongside the term "firearm," which is concededly an offense element, and no one asserted that firearm type is not an offense element.

Moreover, Congress *rejected* an amendment to make § 924(c) a sentencing provision only. S. 1972 (1990), § 1114, subsec. 3, would have amended the third sentence of § 924(c) as follows: "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person *sentenced pursuant to* [~~convicted of a violation of~~] this subsection . . . ." The Department of Justice wrote:

> The first change (which is reflected primarily in subsection (3) of the proposed amendment) would transform section 924(c) from a separate offense to a penalty enhancement provision . . . .
>
> It is well settled that 18 U.S.C. 924(c) is a separate offense, which must be indicted and proved at trial, rather than merely a penalty enhancement. . . . Requiring that use of a firearm be established in conformity with the normal criminal standard of proof is not inappropriate in this context. . . . Accordingly, we oppose the proposal to make section 924(c) into a penalty enhancement provision.

136 Cong. Rec. S9080 (June 28, 1990).

The Department expressed no reservations about firearm types in stating that "924(c) is a separate offense." It then stated its support for amendments to punish use of a semi-automatic firearm in a predicate offense with ten years

imprisonment and "the same change with respect to the use of a short-barreled rifle or shotgun or a destructive device." *Id.*

The Violent Crime Control and Law Enforcement Act, § 110102(c)(2), Title XI, P.L. 103-322, 108 Stat. 1796, 1998 (1994) inserted "semiautomatic assault weapon" after "short-barreled shotgun" in § 924(c).[45] This "*adds use of a semiautomatic assault weapon to the crimes* covered by the mandatory minimum" in § 924(c). House Report 103-489, at 23 (1994), in 1994 U.S.C.C.A.N. 1820, 1831 (emphasis added).

In sum, the legislative history makes clear that "firearm," "machinegun," and the other listed firearm types were intended to be treated equally as offense elements. The legislative history does not indicate that the enhanced firearm types were intended to be treated as mere sentencing factors.

CONCLUSION

This Court should reverse the judgments of the court of appeals, vacate the thirty-year sentences of petitioners, and remand the case for resentencing under 18 U.S.C. § 924(c)(1) to no more than five years imprisonment.

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[45] By the time of that amendment, the only circuit rulings held that the jury must find the specified firearm types. *Sims*, 975 F.2d at 1235; *Martinez*, 7 F.3d at 147-49; *Melvin*, 27 F.3d at 714. This was apparently the practice in all circuits since the 1986 Act first specified firearm types. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940) noted:

> The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.

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APPENDIX

APPENDIX: SURVEY OF STATE LAW

SUMMARY

A survey of the laws of the States and the District of Columbia reveals the following:

1. 17 States have no separate statutes for using firearms during commission of a felony. Instead this issue is subsumed under statutes for aggravated felonies. For example, in Texas, there is assault, Penal Code Sec. 22.01, and aggravated assault, Penal code Sec. 22.02, which is assault while using a deadly weapon. These States include: Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, New Jersey, New Mexico, North Dakota, Oklahoma, Tennessee, Texas.

2. 19 States have such statutes, but do not necessarily impose a stiffer penalty for enhanced type weapons like machineguns, short-barreled shotguns, and firearms with silencers. However, such weapons may be found as elements of criminal offenses. These States include Alaska, Arizona, D.C., Maryland, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, Wyoming.

3. 15 states have such statutes and do impose a stiffer penalty for enhanced type weapons like machineguns, short-barreled shotguns, and firearms with silencers. These States include Alabama, Arkansas, California, Connecticut, Florida, Georgia, Virginia, Hawaii, Louisiana, Massachusetts, Montana,

Ohio, Oregon, Rhode Island, Washington. Of these, Ohio and Oregon specifically provide by statute that the type of weapon be alleged in the Indictment.

4. No state by statute or case law provides that the judge may enhance a sentence because of the type of weapon. Exceptions exist for North Carolina, Nevada, and Pennsylvania.

STATE STATUTES

ALABAMA
Title 13A, Ch. 11

Sec. 13A-11-63: possess or use a short-barrel rifle or shotgun; Class C felony

Sec. 13A-5-6: Class C felony = 1 yr. 1 day to 10 years

Sec. 13A-11-71: possess a pistol during a crime of violence

ALASKA
Title 11

Sec. 11.61.90: use firearm during drug crime; Class A felony = up to 7 years

Sec. 11.81.900: firearm = pistol, rifle, shotgun

ARIZONA
Title 13

Sec. 13-3102(A)(8): use deadly weapon in drug crime; Class 4 felony

Sec. 13-701: Class 4 felony = 2 ½ years

ARKANSAS

Sec. 5-73-104: use or possess machinegun, sawed-off

rifle or shotgun, gun with silencer; Class B felony

Sec. 5-4-201: Class B = 5 to 20 years

Sec. 5-73-204: possess or use a machinegun "for offensive or aggressive purposes"; at least 10 years

Sec. 5-73-211: possess or use machinegun in crime of violence; at least 20 years

CALIFORNIA
Title 2, Penal Code

Sec. 12022(a): armed with firearm during commission of a felony

- regular firearm = 1 year consecutive
- machinegun = 3 years consecutive
- can impute to co-conspirators

Sec. 12022(b): uses deadly or dangerous weapon in committing a felony ; 1 year consecutive

Sec. 12022(c): armed with firearm during drug crime; 3 to 5 years consecutive

Sec. 12022.3: use of weapon in sex crime; 3, 4 or 10 years consecutive

Sec. 12022.5:

(a)(1): personally uses firearm while committing felony; 3,4 or 10 years consecutive

(b)(2): personally uses machinegun or assault weapon while committing a felony: 5, 6 or 10 years consecutive

(c): personally uses firearm in drug crime; 3, 4 or 10 years consecutive

COLORADO

CONNECTICUT

Sec. 53-202: possess or use machinegun in crime of violence; 10 to 20 years

DELAWARE

D.C.
Title 22

Sec. 22-3204(b): possess pistol or machinegun during crime of violence; 5 to 15 years

FLORIDA
Title 46

Sec. 790.07: use or carry a firearm [includes machineguns, silencers, Sec. 790.001], during crime of violence; 2nd degree (Sec. 775.082 = 0-15 years)

Sec. 775.087(2): if convicted of a felony, and possessed a machinegun during that crime; minimum 15 years

GEORGIA

Sec. 26-2918 [same as O.C.Ga. 16-11-160]: use machinegun, sawed-off rifle or shotgun, silencer during commission of certain felonies; 10 years consecutive

HAWAII

Sec. 134-51: use deadly or dangerous weapon while committing a crime; Class C felony, 5 years (Sec. 706-660)

Sec. 706-660.1 [creates mandatory minimums]: use firearm when committing a felony—

Regular firearms: up to 15 years depending on class of underlying felony

Machineguns: 5 to 20 years depending on class of underlying felony

IDAHO

ILLINOIS

INDIANA

IOWA

KANSAS

KENTUCKY

LOUISIANA

Sec. 14.94(f): discharging weapon during commission of felony or drug crime; 10 to 20 years, except if machinegun 20 to 30 years

MAINE

MARYLAND
Article 27

Sec. 36B(d): use a handgun in commission of crime of violence or felony; 5 to 20 years

Sec. 372 et seq. = Uniform machine Gun Act

Sec. 373: use machinegun in crime of violence; 0 to 20 years

MASSACHUSETTS
Title 1

Ch. 265, Sec. 18B:

Use firearm, rifle or shotgun in crime = not less than 5 yrs. (subsequent offense: not less than 20 yrs.)

Use large capacity weapon or machine gun = not less than 10 years (subsequent offense: not less than 25 yrs.)

MICHIGAN
Title 28
Sec. 28.424(2): carry or possess a firearm when committing a felony; 2 years consecutive

MINNESOTA

MISSISSIPPI

MISSOURI
Title 38, Ch. 571
Sec. 571.015: commit a felony using a deadly weapon; 0 to 3 years

MONTANA
Title 45, Ch. 8
Sec. 45-8-303: use a machinegun in a crime or violence; at least 20 years
Sec. 45-8-301, 305, 307: Uniform Machinegun Act

NEBRASKA
Chapter 28
Sec. 28-1208: use a firearm or deadly weapon to commit a felony; Class II felony, consecutive

NEVADA
Volume 10
Sec. 193.165: use firearm in commission of a crime;

same term of imprisonment as underlying crime, consecutive not a separate offense

NEW HAMPSHIRE
Ch. 650
Sec. 650-A:1: use a firearm to commit a felony; Class B felony
Sec. 651.2(II-b): minimum 1 year consecutive

NEW JERSEY

NEW MEXICO

NEW YORK
Article 265, Penal Code
Sec. 265.08 or 265.09: using a firearm [including machinegun] when committing a Class B or C felony, is also a Class B or C felony respectively

NORTH CAROLINA
Ch. 14, Art. 35
Sec. 14-2.2: use of firearm during felony; at least 5 years consecutive
Sec. 15A-1340.16A: add 5 years to sentence a judge issue; not a separate offense

NORTH DAKOTA

OHIO
Title 29
Sec. 2929.14: use of firearm during commission of felony

- 3 years consecutive for regular firearm
- 6 years consecutive for machinegun or silencer

Sec. 2941.144: "use of machinegun" must be in Indictment

Sec. 2941.145: "use of firearm" must be in Indictment

OKLAHOMA

OREGON

Title 16

Sec. 161.610: use of firearm during felony
- must be in Indictment and proved at trial
- firearm: sentence on underlying felony must be at least 5 years
- machinegun: sentence on underlying felony must be at least 10 years

PENNSYLVANIA

Title 18

Sec. 6103: commit a felony while armed with a firearm

Sec. 6119: 1st degree misdemeanor

Sec. 908: use of machinegun or sawed-off; 1st degree misdemeanor

Title 42

Sec. 9712: possess firearm while committing crime of violence, placing victim in danger of death or serious bodily injury
- sentence on underlying felony must be at least 5 years
-not a separate offense or an element of the offense; judge decides by a preponderance

RHODE ISLAND

Title 11

Sec. 11-47-3: possess firearm during crime of violence; at least 3 years

Sec. 11-47-8: possess machinegun or sawed-off; 0-10 years
- possess firearm during drug crime; 2 to 20 years, consecutive

SOUTH CAROLINA

Title 16

Sec. 16-23-490: possession firearm [including machinegun] when committing a violent felony
- must be alleged in Indictment
- 5 years, consecutive or concurrent

SOUTH DAKOTA

Title 22

Sec. 22-14-12: committing a felony when armed [including machinegun]; Class 2 felony, consecutive

Sec. 22-14-14: must be charged separately in the Indictment

TENNESSEE

TEXAS

UTAH

Title 76

Sec. 76-3-203: use of dangerous weapon in felony; is a jury issue; 1 year consecutive

VERMONT
Title 13

Sec. 4005: carry dangerous weapon while committing felony; 0-5 years

VIRGINIA
Title 18.2, Art. 5: Uniform Machinegun Act

Art. 5, Sec. 18.2-290: use of machinegun for aggressive purposes; Class 4 felony

Art. 6, Sec. 18.2-300: possession or use of sawed-off in crime of violence; Class 2 felony

Art. 7, Sec. 18.2-53.1: use firearm in felony; 3 years consecutive

WASHINGTON
Title 9

Sec. 9.41.225: discharge or threaten with a machinegun in a felony; Class A (Sec. 9A.20, at least 20 years)

Sec. 9.94A.310: provides for additional sentence when armed with firearm during a felony; up to 5 years more

- has a grid like the USSG
- not a separate crime, but must be proved by State beyond a reasonable doubt

WEST VIRGINIA
Chapter 61, Art. 7, Sec. 62-12-2: not eligible for probation if used a firearm in commission of a felony

- must be in Indictment
- must be found by trier of fact

WISCONSIN
Chapter 941

Sec. 939.63: commits a crime using a dangerous weapon
- increases maximum of underlying felony
- also establishes 3 year minimum sentence

WYOMING
Title 6

Sec. 6-8-101: use a firearm while committing a felony; up to 10 years consecutive